No. 12904

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE M. SEPULVEDA,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent-Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney

Attorneys for Appellee.

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 5/17/51 -- 45 COPIES

No. 12904

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE M. SEPULVEDA,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent-Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney

Attorneys for Appellee.

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 5/17/51 -- 45 COPIES

INDEX

Page

STATEMENT OF PLEADINGS and FACTS.. 1

QUESTIONS PRESENTED 4

ARGUMENT:

Part 1 4

Part 2 8

Part 3 9

CONCLUSION 10

CITATIONS

CASES

Brooks v. Steele, 177 F. (2d) 782..... 10

Brown v. Johnston, 91 F. (2d) 370, cert. den. 302 U.S. 728 9

Carpenter v. Hudspeth, 112 F. (2d) 126..... 8

Dorsey v. Gill, 148 F. (2d) 857, cert. den. 325 U.S. 890 9

McBride Ex Parte, 68 F. Supp. 139..... 9

Serentino v. United States, 36 F. (2d) 871..... 7

Stidham v. United States. 170 F. (2d) 294..... 9

United States v. Evans, 333 U.S. 483..... 6

United States v. Martinez-Gonzales, 89 F. Supp. 62 .....5, 6, 7

Wilson, Petition of, 68 F. Supp. 168..... 9

STATUTES

Smuggling Aliens Statute (Immigration Act of 1917, Sec. 8, 8 U.S.C.A. Sec. 144)..... 3, 4

Page

U. S. Constitution, Amendments 5, 6..... 9
White Slave Traffic Act, (18 U.S.C.A. 398 et al).. 7

UNITED STATES CODE

Title 8, Section 144..... 3, 4
Title 18, Section 317..... 7
Title 18, Section 398..... 7
Title 18, Section 4083..... 9

No. 12904

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE M. SEPULVEDA,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent-Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on December 30, 1950 lodged with the Clerk of the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus in forma pauperis (Tr. 1-9), whereupon the District Court

on January 10, 1951, directed the petition to be file and ordered appellee to supply its deficiencies and t produce the body of the petitioner before the cour on January 23, 1951, and to show cause of his de tention, which matter was duly continued for hearin to January 30, 1951 (Tr. 10 - 13).

To the Order to Show Cause appellee served an filed a response on January 26, 1951 (Tr. 14 - 20 and produced in court the body of appellant at th hearing on January 30, 1951, together with the tria records therein ordered by the court (Tr. 21 - 36) at which time appellant filed his written motion fo the appointment of counsel in his behalf (Tr. 37 - 38) and upon denial thereof entered his oral traverse t the return, confining the issue to the question o the number of offenses committed in bringing int the United States four unauthorized aliens on th same day, and the legality of confinement in a peni tentiary on sentence of one year for offense punish able by imprisonment not exceeding five years (Tr 39 - 44) and at which hearing the facts set fort below were adduced, and based thereon, an orde denying appellant's petition was entered February 2 1951 (Tr. 45 - 46). From that final order appellan has brought this appeal (Tr. 47 - 52).

The facts material to a determination of appellant's right to discharge, as disclosed in the record, may be summarized as follows:

Appellant was indicted upon four (4) counts of an indictment charging singly in each count the illegal bringing into the United States of an alien person as named therein, in violation of Title 8, U.S.C.A., Section 144 (Tr. 21 - 22), was tried and found guilty by jury on all four counts (Tr. 23 - 30), and on June 22, 1950 was sentenced to imprisonment for one year and a fine of $500.00 on Count 1; one year and a fine of $500.00 on Count 2, consecutively, to begin and run upon the expiration of sentence on Count 1; one year and a fine of $1.00 on Count 3, to begin and run concurrently with sentence on Count 1; and on Count 4 imposition of sentence was suspended and defendant placed on probation for five years, and to stand committed (Tr. 31 - 33).

Appellant was committed to the United States Penitentiary at McNeil Island, on July 7, 1950, sentence having begun at time of imposition June 22, 1950, and according to institutional computation will be eligible for conditional release on January 29, 1952, in the event the committed fine is paid (Tr. 41).

QUESTIONS PRESENTED

1. Is the question of whether the Smuggling Aliens Statute creates separate offenses as to each of four aliens smuggled in allegedly at one time, or merely creates an augmented penalty therefor, a matter within the scope of habeas corpus proceedings?

2. Did the denial of appellant's motion for assistance of counsel by the District Court in the proceedings below render the hearing unfair?

3. Is appellant's confinement in the penitentiary on a sentence of one year for offense punishable by imprisonment not exceeding five years, legal?

ARGUMENTS AND AUTHORITIES

1. THE QUESTION OF WHETHER THE SMUGGLING ALIENS STATUTE CREATES SEPARATE OFFENSES AS TO EACH OF FOUR ALIENS BROUGHT IN TO THE UNITED STATES ALLEGEDLY AT ONE TIME OR WHETHER IT MERELY CREATES AN AUGMENTED PENALTY THEREFOR IS NOT A MATTER WITHIN THE SCOPE OF HABEAS CORPUS.

The statute involved in this proceeding is Title 8, U.S.C.A., Section 144, which provides as follows:

> "*Bringing in or harboring or concealing certain aliens.*

> Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor, in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in. Feb. 5, 1917, c. 29, Sec. 8, 39 Stat. 880."

In *United States v. Martinez Gonzales*, 89 F. Supp. 62, the District Court held a single count indictment duplicitous which charged the defendant with the smuggling into the United States of four aliens. In that case, the District Court reasoned at page 65 of the decision, as follows:

> "Under the section there is not a general punishment for the act of bringing in or attempting to bring in aliens, as pointed out, but a separate mandatory punishment is required to be imposed on a defendant for each alien brought in or attempted to be brought in. *Therefore, such conduct is a separate crime with separate punishment as to each alien and must be separately charged in different counts of an indictment.*" (Italics ours).

At page 65, the court further observed:

> "One of the tests to determine whether or not one crime is necessarily included in another is whether or not an acquittal of one bars prosecution of the other. * * * Obviously, an acquittal of the defendant for the crime of bringing in any one of the four aliens could not bar prosecution for bringing in the other three."

And it might be added that after the court pronounced one sentence for smuggling in one alien, the court did not lose jurisdiction to sentence defendant for another alien brought in, if we read the statute correctly.

Speaking of the wording of the clause in the Statute, "for each and every alien," the Supreme Court in *United States v. Evans*, 333 U. S. 483, at page 494, in discussing the application of the smuggling penalty to the conduct of "concealing and harboring", also condemned by the statute, had this to say:

> "The clause's function was solely to augment the penalty when more than one alien was involved. That function was not changed when the new offenses were added."

Whether the reasoning of the District Court in the *Martinez Gonzales* case, *supra*, as to separate punishment creating separate offenses is the correct interpretation of the statute, or the augmented pen-

alty is to be taken as creating an offense of the nature of grand larceny as opposed to petit larceny in its application to the number of aliens smuggled in, the number of the counts in the indictment would appear to be unharmful to the appellant, since the number of sentences are the cause of his detention, and complaint, and they are clearly in conformity with the statute.

While earlier pleadings under this statute, as revealed by the indictment in *Serentino v. United States*, 36 F. (2d) 871, may have undertaken to observe the construction placed upon somewhat similar conduct arising out of mail theft, 18 U.S.C.A. 317, and the White Slave Traffic Act, 18, U.S.C.A. 398, in their measure of what constituted a single offense, yet it should be borne in mind that such statutes provided only for a general punishment.

It is our contention that the District Court's view is amply supported, even though the term "augment the penalty" was used by the Supreme Court, where at page 64, the District Court in the *Martinez Gonzales* case, *supra*, held and cited authority therefor:

> "It is the punishment prescribed which makes an act a crime, not a mere interdiction of conduct without punishment. There is no better illustration of this principle than the opinion of

> the Supreme Court in *U. S. v. Evans*, 333 U.S. 483, 68 S. Ct. 634, 92 L. Ed. 823, where the court held, in construing this identical section, that the harboring or concealing of an alien was not a crime because no punishment was prescribed for that conduct."

Aside from the foregoing consideration, it is appellee's contention that the questions of pleading herein involved are matters for review and not for habeas corpus proceedings, and as found by the court below, "the sufficiency of the evidence whereby the jury convicted petitioner was reviewable on appeal, but cannot be tested in these proceedings to effect the discharge of the petitioner from confinement after his conviction, the scope of review on habeas corpus being limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged." (Tr. 42)

See *Carpenter v. Hudspeth*, 112 F. (2d) 126.

2. THE DENIAL OF APPELLANT'S MOTION FOR ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW DID NOT RENDER THE HEARING UNFAIR.

The learned jurist in the court below is a judge of long experience in habeas corpus proceedings, and well qualified thereby to observe that in such matters the applicant could better represent himself than be represented by some member of the bar, unac-

quainted not only with the facts in his case, but, perhaps with the procedure itself.

The framers of the Constitution did not feel the necessity for including in the provision for assistance of counsel any assistance that might be required in the effort of the accused to continue his defense after conviction.

See U. S. Constitution, Amendments 5, 6;

Stidham v. U. S., 170 F. (2d) 294;

Brown v. Johnston, 91 F. (2d) 370, cert. den. 302 U.S. 728;

Dorsey v. Gill, 148 F. (2d) 857, cert. den. 325 U.S. 890;

Ex parte McBride, 68 F. Supp. 139;

Petition of Wilson, 68 F. Supp. 168.

3. APPELLANT'S CONFINEMENT IN THE PENITENTIARY ON A SENTENCE OF ONE YEAR FOR OFFENSE PUNISHABLE BY IMPRISONMENT NOT EXCEEDING FIVE YEARS IS IN ALL RESPECTS LEGAL.

Title 18, U.S. Code, Section 4083, which provides for penitentiary imprisonment and consent when required, provides as follows:

"Persons convicted of offenses against the United States or by courts martial and sentenced to terms of imprisonment of more than one year may be confined in any United States Penitentiary. A sentence for an offense punishable by

> imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant."

The appellant was convicted of an offense punishable by sentence of imprisonment not exceeding five years on any one count, and he has not, therefore, been deprived of any rights by his confinement in the penitentiary upon sentences of one year on each of three counts.

As stated in *Brooks v. Steele*, 177 F. (2d) 782, at page 785:

> "The statute makes distinction between two classes of offenses by the extent to which the offenses are respectively made punishable. It does not attempt to classify offenders according to different punishment that may have been meted out to them."

CONCLUSION

The appellee, therefore, contends that for the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney

Attorneys for Appellee.